ADMINISTRATIVE EXERCISE OF THE POLICE POWER.

IN legislation passed in the exercise of the so-called police power, measures designed to protect the health and safety of the people, it is conceivable that the legislature might ascertain in advance the qualifications necessary for those engaged in any calling or the conditions essential to guard against danger and disease, and set forth in the statute specific requirements of regulation or prohibition. But the progress of scientific knowledge is so rapid that the requirements of any statute might soon prove less adequate than other measures suggested by a more expert body. Moreover, any general rule declared by the legislature would be too inflexible to conform to the varying necessities of different areas of population, or to meet exigencies unforeseen at the time the statute is passed.

The most salutary exercise of the police power is that which seeks to forestall the advent of danger, not merely to avert its consequences. This is best attained by requiring the presence of certain personal qualifications or physical conditions as a prerequisite to the lawfulness of any action sought to be taken. The inquiry as to compliance with requirements is a task obviously unsuited to the legislature. And the function of the judiciary is properly limited to determining in cases and controversies whether any rule has been violated. And when health or safety are threatened by dangerous conditions or practices, adequate protection demands that they cease forthwith. The community cannot await the slow course of judicial proceedings.

The legislature has therefore often seen fit to delegate to administrative authorities the power to set forth the further requirements necessary to effectuate the general purpose declared by the statute, and to ascertain in individual instances whether the requirements have been met, and, if necessary, to take summary and immediate action to avert or minimize the threatened or actual danger. The

power to act in all these instances has been repeatedly sustained, in spite of the objection that it involves the exercise of legislative or judicial functions.[1]

I.

Precautionary Regulation.

It is obvious that anything which might be prohibited entirely may be subjected to governmental supervision and restriction. And many acts or conditions not necessarily pernicious in themselves may be regulated as a precaution against the dangers involved in inefficiency, unwholesomeness and excess. The government and its agents are accorded a wider latitude in exercising a qualified restraint, than in enforcing complete prohibition or direct and positive interference with liberty or property.

This restraint commonly takes the form of limiting the exercise of some calling or business to those persons or premises specially licensed. The exercise of this power involves the selection of the acts or objects to be regulated, the fixing of a standard, and the decision whether in individual instances the requirements of the standard have been met. The latter task is necessarily an administrative one; and the two former, while they might conceivably be performed by the legislature, are quite generally delegated to administrative authorities, owing to the peculiarity of urban conditions and the superior technical knowledge of experts.

A license as an official affirmation of personal fitness or approved physical conditions must be distinguished from a license which is merely the acknowledgment of the payment of a tax. Callings, occupations and businesses are proper subjects of taxation; and the method of collection may take the form of the denial of the right to proceed until payment of the tax is evidenced by a so-called license. In such cases the only reason for denying the license is the non-payment of the tax. But where the license is required as a police regulation, it may be withheld because the personal qualifications or physical conditions do not meet the requirements of the standards imposed. While it is proper to exact a fee to cover the expense of supervision, the courts will hold invalid any exaction

[1] Blue *v.* Beach, 155 Ind. 121 (1900); People *v.* Hasbrouck, 11 Utah 291 (1895); State *v.* Hathaway, 115 Mo. 36 (1892).

of money manifestly for the purpose of securing revenue, unless there is present both the intent as well as the power to tax. In a case where a license was required solely as a police measure, and a dispute arose as to the validity of the exaction of a fee and the proper person to be charged, a board which had expressed its willingness to examine relator as to his qualifications for locomotive engineer, but had stated that it would not issue a license without payment of the fee, was ordered by *mandamus* to admit him to examination, and if found qualified to issue the license.[2]

The power to regulate must be used for the purpose of regulation. An ordinance requiring department stores to be licensed, which imposed a fee but provided no regulation or supervision, was held invalid as a police measure.[3] The court seemed to doubt whether department stores are proper subjects for regulation. The selection of such subjects is a matter over which they retain control. It has been held that the requirement that horse-shoers must have three years' experience and pass an examination bears no relation to public health, comfort, safety or welfare.[4] And a statute vesting in an administrative board the power to determine who should be permitted to sell patent and proprietary medicines was held unconstitutional on the ground that the public health did not require that the sale of such articles be confined to persons with scientific attainments.[5]

The problem of judicial censorship over the subjects selected for regulation and the standards which may be required is one pertaining to the limits of the police power generally; though the courts may concede a wider latitude to the legislature as a coordinate department of government than would be accorded to an inferior administrative authority. In general, the licensing power may be exercised with respect to any business affording the possibility of practices or conditions inimical to health and safety, or to any calling requiring the exercise of expert skill or knowledge to avoid improper action necessarily prejudicial to those interests which it is the duty of the state to protect.

Governmental supervision may be aimed at confining the exer-

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[2] Baldwin *v.* Kouns, 81 Ala. 272 (1886).

[3] State *ex rel.* Wyatt *v.* Ashbrook *et al.*, 154 Mo. 375 (1899).

[4] Bessette *v.* The People, 193 Ill. 334 (1901).

[5] Noel *v.* The People, 187 Ill. 587 (1900).

cise of a calling to individuals personally qualified or to physical conditions deemed safe and sanitary. Among the acts held properly subject to regulation in order to secure the latter end, are the storing of gunpowder,[6] or inflammable and explosive oils,[7] the blasting of rock,[8] the erection of proposed buildings,[9] or bill-boards,[10] the operation of slaughter-houses,[11] hotels,[12] livery stables,[13] laundries,[14] and nurseries for trees and plants,[15] the peddling of milk,[16] and the sale of milk,[17] meat[18] and provisions generally.[19]

Among the callings where personal fitness may be required we find those of physicians,[20] dentists,[21] pharmacists,[22] engineers,[23] mine inspectors,[24] plumbers,[25] barbers [26] and guides.[27]

The power may be exercised not only to protect health and safety, but also to guard against fraud and immorality. For this

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[6] Williams *v.* Augusta, 4 Ga. 509 (1848).

[7] Richmond *v.* Dudley, 26 N. E. 184 (1891); Scranton *v.* Jermyn Oil Co., 5 Lanc. L. Rev. 277 (Pa. 1888).

[8] Commonwealth *v.* Parks, 155 Mass. 531 (1892).

[9] Hasty *v.* City of Huntington, 105 Ind. 540 (1886); Com'rs of Easton *v.* Covey, 74 Md. 262 (1891); State *v.* Sharkey, 49 Minn. 503 (1892); State *v.* Johnson, 114 N. C. 846 (1894).

[10] City of Rochester *v.* West, 164 N. Y. 510 (1900).

[11] Crescent City Live Stock Co. *v.* Butchers Union Live Stock Co., 111 U. S. 746 (1883); St. Louis *v.* Howard, 119 Mo. 41 (1893).

[12] Russellville *v.* White, 41 Ark. 485 (1883); Holland *v.* Pack, Peck (Tenn.) 151 (1823); State *v.* Stone, 6 Vt. 295 (1834); Stanwood *v.* Woodward, 38 Me. 192 (1854).

[13] 33 Cent. Dig., columns 1492, 1493.

[14] *In re* Yick Wo, 68 Cal. 294 (1885).

[15] *Ex parte* Hawley, 115 N. W. 93 (S. Dak. 1908).

[16] People *v.* Mulholland, 82 N. Y. 324 (1880).

[17] People *v.* Vandecarr, 175 N. Y. 440 (1903).

[18] Kinsley *v.* Chicago, 124 Ill. 359 (1888); Porter *v.* City of Water Valley, 70 Miss. 560 (1893); Ash *v.* The People, 11 Mich. 347 (1863).

[19] Thomas *v.* Town of Mount Vernon, 9 Oh. 290 (1839).

[20] Dent *v.* West Virginia, 129 U. S. 114 (1889); Reetz *v.* Michigan, 188 U. S. 505 (1903); People *v.* Hasbrouck, 11 Utah 291 (1895); France *v.* The State, 57 Oh. St. 1 (1897); State *ex rel.* Burroughs *v.* Webster, 150 Ind. 607 (1898).

[21] State *v.* Creditor, 44 Kan. 565 (1890); Gosnell *v.* The State, 52 Ark. 228 (1889); State *v.* Vandersluis, 42 Minn. 129 (1889); Wilkins *v.* State, 113 Ind. 514 (1887).

[22] State *v.* Heineman, 80 Wis. 253 (1891); Noel *v.* The People, 187 Ill. 587 (1900).

[23] McDonald *v.* The State, 81 Ala. 279 (1886); Smith *v.* Alabama, 124 U. S. 465 (1888); Nashville, etc. R. R. Co. *v.* Alabama, 128 U. S. 96 (1888).

[24] Wilmington Star Mining Co. *v.* Fulton, 205 U. S. 60 (1906).

[25] Singer *v.* State, 72 Md. 464 (1890); People *v.* Warden of City Prison, 144 N. Y. 529 (1895); Douglas *v.* The People, 225 Ill. 536 (1907).

[26] State *v.* Zeno, 79 Minn. 80 (1900); State *v.* Sharpless, 71 Pac. 737 (Wash. 1903).

[27] State *v.* Snowman, 94 Me. 99 (1900).

reason it is held that the privilege of book-making and pool-selling may be limited to persons found to be of good character.[28] Such provisions are of course sustained in regulating any calling, such as the liquor traffic, which may be prohibited entirely. And even with respect to other callings, having no necessary flavor of evil, the power to license is upheld, though the qualifications required are of a moral rather than an intellectual nature. Licenses are demanded of private detectives,[29] pawnbrokers,[30] junk-dealers and dealers in second-hand goods,[31] auctioneers,[32] book-canvassers,[33] and hawkers and peddlers.[34] Sometimes the inquiry preliminary to the granting of a license will relate to the conditions of the place of business as well as to the qualifications of the one seeking permission. This would be true as to the sale of liquor, the conduct of a billiard hall[35] or other place of amusement,[36] and of warehouses.[37]

Sometimes the precautionary measures of administrative authorities extend beyond mere inspection to positive interference. The courts have sustained an ordinance requiring all second-hand clothing to be fumigated by public authorities at the expense of the owner,[38] and a statute requiring all rags to be disinfected, whether actually infected with disease or not, where the danger was thought too great to permit of discrimination.[39] The same reason justifies compulsory vaccination.

The acts and businesses subjected to regulation are far more numerous than any list to be gleaned from judicial decisions; for

[28] State *v.* Thompson, 160 Me. 333 (1900).

[29] *In re* Burnett's Application, 5 Pa. Dist. R. 3 (1895).

[30] Launder *v.* Chicago, 111 Ill. 291 (1884).

[31] Grand Rapids *v.* Brandy, 105 Mich. 670 (1895).

[32] People *ex rel.* Schwab *v.* Grant, 126 N. Y. 473 (1891).

[33] Borough of Warren *v.* Geer, 117 Pa. St. 207 (1887).

[34] State *v.* Harrington, 68 Vt. 622 (1896); Duluth *v.* Krupp, 46 Minn. 435 (1891); Commonwealth *v.* Gardner, 133 Pa. St. 284 (1900); Morrill *v.* State, 38 Wis. 428 (1875).

[35] *In re* Snell, 58 Vt. 207 (1885).

[36] Wallack *v.* City of New York, 3 Hun (N. Y.) 84 (1874).

[37] Cargill Co. *v.* Minnesota, 180 U. S. 452 (1900). And for protection against fraud in sales, weights and measures may be required to be proved and sealed by a public inspector. People *ex rel.* Gould *v.* Rochester, 45 Hun (N. Y.) 102 (1887). The use of uninspected standards has been held a defense in an action for the price of goods sold. Bisbee *v.* McAllen, 39 Minn. 143 (1888); Smith *v.* Arnold, 106 Mass. 269 (1871).

[38] Rosenbaum *v.* Newbern, 118 N. C. 83 (1896).

[39] Train *v.* Boston Disinfecting Co., 144 Mass. 523 (1887).

many statutes and ordinances have been long enforced without being questioned in the courts.[40]

It is to be noted that even where supervision and the requirement of a license are not deemed improper, ordinances regulating useful callings have been declared invalid on account of discriminations in favor of certain classes or individuals which bear no relation to the fitness of those exempted from the examination or inspection required of others.[41] A regulation which required a license for all electricians except those employed by the city in its departments of police and public buildings, and those employed by lighting and electric railway companies in the installation and maintenance of meters and pole-line service, was held void on the ground of discrimination, where the court was of opinion that the work of those excepted possessed the same elements of danger as that of those required to be examined.[42] While it has been held proper to divide engineers into four classes according to the character of the work in which they are engaged, with different qualifications for each class,[43] a regulation which required an examination of journeymen plumbers but permitted master plumbers to be registered without examination was declared invalid for lack of uniformity.[44]

The administrative action in establishing the standard set forth as a condition of obtaining the license, like the administrative selection of the subjects to be regulated, is open to judicial review. The court has doubted the legality of a requirement that no medical school would be put on the accepted list if it permitted more than forty-five per cent of its matriculants to graduate,[45] and has held unreasonable and void the requirement that applicants for a plumber's license must possess a knowledge of physics and hygiene.[46] The right to conduct a nursery from which to sell plants and trees cannot be conditioned on establishing that the applicant is "responsible," in the sense that he is financially able to pay damages for bad stock sold.[47] It was said that a man cannot be denied the

[40] See Freund, Police Power, sec. 493, for review of statutory requirements of recent years.

[41] State *v.* Gardner, 58 Oh. St. 599 (1888); Harmon *v.* State, 66 Oh. St. 249 (1902).

[42] State *v.* Gantz, 124 La. 535 (1909).

[43] Hyvonen *v.* Hector Iron Co., 103 Minn. 331 (1908).

[44] Commonwealth *v.* Shafer, 32 Pa. Super. Ct. 497 (1907).

[45] Iowa Eclectic Medical College Ass'n *v.* Shrader, 87 Ia. 659 (1893).

[46] United States *ex rel.* Kerr *v.* Ross, 5 D. C. App. 241 (1895).

[47] *Ex parte* Hawley, 115 N. W. 93 (S. Dak. 1908).

right to sell his trees because he is poor, as poverty is no indication of dishonesty. In a decision sustaining the refusal of a license to practice medicine because of deceptive advertising, the court observed that "unprofessional conduct" must consist in something more than the violation of some code of professional ethics, and indicated that the mere fact of having advertised would be an insufficient ground for denying a certificate, even though such advertising is frowned upon by the profession.[48] In a recent Wisconsin opinion it was observed that there is a wide interval between the ideal and the practical, and that

"common sense as to reasonable requirements and reasonable means of securing such requirements should prevail, not the extreme views of well-meaning persons as to what is for the best. Idealists will often find efforts to force their standards of living upon people generally by legislation barred by constitutional limitations." [49]

It is to be remembered, however, that, in exercising this review, the courts are chary of overruling the standard fixed by the administration. In declining to hold that commissioners had exceeded their discretion in requiring party-walls to be thirteen inches in thickness, Mr. Justice Robb observed:

"In view of the wide latitude of discretion given the commissioners by this act, a plain case of usurpation of power or abuse of discretion must be made before the court would be authorized to interfere." [50]

In another case which sustained as reasonable the administrative ruling that licenses to peddlers of milk would be granted only to those who provide a special room for storing milk and cleansing utensils, the court declared that it would not review the refusal of a license unless facts were alleged showing that the discretion was not honestly exercised in the interest of a pure milk supply, saying:

"The office of an alternative writ, if one were granted, would be to try out in the courts the question as to whether it was good judgment to require milk producers to maintain a separate milk room. This would substitute the opinion of the court for that of the milk officer. It is not

[48] State *v.* State Medical Examining Board, 32 Minn. 324 (1884).
[49] Bunnett *v.* Vallier, 116 N. W. 885 (1908).
[50] United States *ex rel.* Smithson *v.* Ashford, 29 D. C. App. 350 (1907).

desirable or in the public interest that the discretion of the health officer should be so reviewed, and, whether the power to do so exists or not, it ought not, in my opinion, to be exercised in this case." [51]

So also, where the court denied a *mandamus* to coerce the granting of a license where the board had determined that the college from which relator held a diploma was not "reputable," it was said that the methods by which the board should determine the reputability of a dental college not being set forth in the statute, they may do so in any way they deem proper, and that candidates for licenses must submit to their judgments, so long as they are within the boundaries of reason and common sense. "Having once determined the character of a dental college, within all reasonable limits, when and under what circumstances the subject shall be re-opened rests solely in the board's discretion." [52]

With respect to the regulation of those callings requiring expert ability, the Supreme Court has said that the nature and extent of the qualifications demanded must depend primarily upon the judgment of the state as to their necessity, and that if appropriate to the calling and attainable by reasonable study, no objection can be raised to their validity because of their stringency or difficulty. This was applied not only to the right to begin the practice of medicine, but to the privilege of continuing it.[53]

But the qualifications required by statute, and so *a fortiori* by an administrative body, must relate to the subject matter demanding regulation. One cannot be deprived of the right to practice his profession for disqualifications which have no bearing on his fitness to continue therein.[54] Yet the qualifications which relate to fitness are not confined to those of a technical or scientific order, but embrace moral attainments as well. A physician, whatever his scientific attainments, may have his license revoked for employing these faculties perversely.[55]

Under many statutes, however, the administration is not required to establish any standard by which to test the right of an applicant to a license. Each individual case is committed to the

[51] Foote, J., in People *ex rel.* Shelter *v.* Owen, 116 N. Y. Supp. 502 (1909).

[52] State *ex rel.* Coffee *v.* Chittenden, 88 N. W. 587 (Wis. 1902).

[53] Dent *v.* West Virginia, 129 U. S. 114 (1889).

[54] Cummings *v.* Missouri, 4 Wall. (U. S.) 277 (1866); *Ex parte* Garland, 4 Wall. (U. S.) 333 (1866).

[55] Hawker *v.* People, 170 U. S. 189 (1898).

special and unregulated discretion of the board or official. Here obviously the courts cannot review the standard in the subconsciousness of the administration. They are necessarily the final arbiters of the individual right or privilege. For this reason statutes vesting such power are in many jurisdictions declared invalid.

A distinction appears between acts which, though they might possibly be prohibited entirely, yet may be so performed as to give rise to no danger or evil, and those deemed necessarily pernicious, however or wherever sought to be committed. In spite of their evil quality, the law-makers may find universal and complete prohibition inexpedient, and prefer to deny the right to all save those specially selected. The law is clear that, with respect to such acts, this selection and consequent granting of a license may be committed to the unrestrained discretion of an administrative body. The Supreme Court has declared [56] that, since the liquor traffic might be prohibited altogether, there is no inherent right to engage therein, and that therefore the manner and extent of regulation rests entirely in the discretion of the governing authority.

A more difficult question arises with respect to occupations which if properly conducted are confessedly innocuous, where the only source of danger lies in unsanitary conditions or in an excessive number of acts or establishments. In reference to such acts it is asserted by many courts that, though no one may claim the right to follow the given calling or to perform the given acts free from all restraint, each person must be granted permission on complying with certain conditions definitely set forth for his guidance. It has therefore been held improper to make the right to do any lawful act dependent on the mere whim of some administrative board or official, who may in the presence of identical conditions grant the privilege to one and withhold it from another. In Baltimore *v.* Radecke [57] an ordinance prohibiting the erection of a stationary steam engine without the consent of the mayor and council was held void for failure to set forth any conditions controlling the exercise of the discretion to grant or withhold permission. And in Yick Wo *v.* Hopkins,[58] the Supreme Court annulled a similar ordinance relating to the operation of laundries in wooden buildings, and declared:

[56] Crowley *v.* Christensen, 137 U. S. 86 (1890).

[57] 49 Md. 217 (1878).

[58] 118 U. S. 356 (1886).

"The very idea, that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being of the essence of slavery."

The language of this opinion has been cited in many decisions which have declared statutes and ordinances unconstitutional for making the right to exercise some act, trade or calling, not harmful in itself, dependent on the unrestrained discretion of some administrative authority.

But the Supreme Court has receded from the extreme position announced in Yick Wo *v.* Hopkins, and stated that that decision should be rested on the fact that the administration of the law there indicated actual discrimination against a certain class of individuals.[59] And in Wilson *v.* Eureka City,[60] they sustained an ordinance which prohibited the moving of any building on the streets without the written permission of the mayor, although the ordinance did not prescribe the circumstances by which his discretion in the matter was to be controlled. The court refers to *Re* Flaherty[61] and its summary of the decisions where the exercise of this unrestrained discretion has been held proper. It is true that most of them are instances of the use of the streets or the public parks, where the control of the city is more extensive than over acts done on a man's own premises. But others involved statutes which forbade the keeping of swine without a permit from the board of health,[62] or the erection and repair of buildings without a permit from the designated officials,[63] or made the right to ring bells or blow whistles dependent upon the consent of the board of aldermen.[64]

Some of these acts might doubtless have been forbidden to every one within some defined area; but even as to such we have a square conflict of authority; for the decisions which object to the vesting of unrestrained discretion are based on the ground, not that every one has a right to do the thing for which consent is required, but that where not inherently evil whatever the conditions surrounding

[59] Crowley *v.* Christensen, *supra*, p. 276.

[60] 173 U. S. 32 (1898).

[61] 105 Cal. 558.

[62] Quincy *v.* Kennard, 151 Mass. 563.

[63] Hine *v.* The City of New Haven, 40 Conn. 478; Commissioners, etc. *v.* Covey, 74 Md. 262.

[64] Sawyer *v.* Davis, 136 Mass. 239.

it, if permitted to one, it must be granted to another on fulfilling the same objective conditions.

In spite of the dangers of favoritism and unjust discrimination, it may be said that unless such statutes are to be sustained, at least with respect to acts which if done too frequently or in too many places would produce manifest harm, it will be necessary to prohibit certain acts or occupations entirely, in order to prevent the danger which would arise from transferring the unrestrained discretion of the administrative authority to the individuals engaged in the enterprise.

After selecting the subjects for regulation and fixing a standard, there remains the further task of ascertaining in individual instances whether the requirements of the standard have been complied with. With respect to the quality of provisions or the condition of the premises where any business is sought to be conducted, the method employed will usually be that of inspection. Where the possession of personal qualifications is in issue, the determination may be reached by examining the candidate to discover his attainments, or by ascertaining whether he has fulfilled the requirements of study or received a previous certificate prescribed by statute or regulations. In Reetz *v.* Michigan [65] it was objected that the power to determine whether one had been legally registered under a prior statute involved the decision of a legal question. But the Supreme Court answered that no provision in the federal Constitution forbids a state from granting to a tribunal, whether called a court or a board or registration, the final determination of a legal question. The statute giving this power to the Board of Registration was sustained although no right of appeal was therein provided. And it is held that the task of determining upon qualifications as to honor and moral fitness may be devolved upon an administrative body.[66] But the applicant is entitled to be heard upon the question.[67]

Where the requirement of a license and the standards imposed are both valid, the receipt of permission is essential to the legality of action taken. It is no defense that the individual does in fact possess the qualifications which would entitle him to a license. The

[65] 188 U. S. 505 (1903).

[66] State *v.* State Medical Board, 32 Minn. 324 (1884).

[67] *Ibid., semble.*

purpose of precautionary regulation would be defeated by allowing every one to be his own inspector, subject to the subsequent approval of a jury. Unlicensed acts are illegal even though a license if requested could not rightfully be denied.[68] One who makes no request for permission can defend his conduct only on the ground that permission could not be required. The determination of qualifications is committed primarily to administrative, not judicial, authorities. The courts will not conduct an original investigation, nor can there be judicial review of an administrative determination which has not been made.

If, however, the board refuse to entertain an application for a license, their consideration of qualifications may be coerced by *mandamus*. The writ has issued to compel the giving of an examination to determine whether relator is entitled to practice law,[69] and to compel a Civil Service Board to admit relator to examination for an appointment to a position in the classified service.[70]

Moreover, the license itself may be secured by *mandamus* when the officers withholding it are vested with no discretionary power, but entrusted merely with a ministerial duty.[71] This relief was ob-

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[68] This is true even where a license has been applied for and wrongfully refused. City of Montpelier *v.* Mills, 85 N. E. 6 (Ind. 1908). *Vide infra*, p. 289. Third parties may take advantage of the illegality of unlicensed acts in a suit to recover for work done and materials furnished, Bronold *et al. v.* Engler, 105 N. Y. Supp. 508 (1907). Some decisions limit the doctrine to cases where the statute prohibits engaging in the business without a license or expressly vitiates all contracts made by one without a license, and refuse to apply it where such provisions are absent, Streivel *v.* Lally, 101 S. W. 1134 (Ark. 1909); or where the statute merely imposes a penalty, Sunflower Lumber Co. *v.* Turner Supply Co., 48 So. 510 (Ala. 1909). If there was no attempt to comply with the law, third parties may take advantage of illegality where the requirement of a license is a revenue rather than a police measure, Gilley *v.* Harrel, 101 S. W. 424 (Tenn. 1907); but it is held that the non-payment of a revenue tax, where it was tendered but not accepted, does not invalidate the contracts of an unlicensed person, where the occupation was otherwise lawful and required no regulation or supervision. Fossett *v.* Rock Island Lumber & Mfg. Co. *et al.*, 76 Kan. 428 (1907).

[69] Florida *ex rel.* Lamson *v.* Baker, 25 Fla. 598 (1889).

[70] People *ex rel.* Ryan *v.* Wheeler, 2 N. Y. St. Rep. 656 (1886).

Cf. United States *ex rel.* Kerr *v.* Ross, 5 D. C. App. 241 (1895), where commissioners who had unlawfully delegated to a board of examiners the power to entertain applications for licenses were compelled by *mandamus* to receive and entertain the application themselves, and Territory *v.* McPherson, 6 Dak. 27 (1888), where the writ issued to compel commissioners to fix licenses to sell liquor under the right statute after they had fixed them under the wrong one.

[71] People *ex rel.* Danziger *v.* Metz, 107 N. Y. Supp. 970 (1908); State Board of Pharmacy of Kentucky *v.* White, 84 Ky. 626 (1886); People *v.* Busse, 231 Ill. 251 (1907)

tained where the refusal to issue a permit for a building was based on authority claimed under an ordinance declared invalid,[72] and where an excise board denied a license on grounds not committed to their jurisdiction,[73] or for the professed reason that no more saloons were needed and that a number of neighboring property owners less than a majority objected, which was no legal ground for the refusal.[74]

Where, however, the denial of a license is based on a finding of fact lawfully committed to the discretion of the licensing authority, *mandamus* is not available to substitute the discretion of the court for that of the administrative board. In a case where the writ was sought after the board had passed adversely on the standing of the medical school from which relator received his diploma, the opinion stated that

"while courts on suitable occasions will apply the spur of *mandamus* to put the discretion of inferior courts and officers in motion, yet after that discretion has been exercised, as in the case at bar, no matter in what way, the mandatory authority to compel the doing of the particular act prayed for is at an end."

It was further observed that, should the court arrogate to itself such revisory powers,

"it would, while palpably usurping functions conferred exclusively by the law upon others, in the endeavor to ascertain whether a given college is a 'medical institution in good standing,' . . . find itself seriously embarrassed by the character of the investigation it would be compelled to make; might find itself wandering amid the mazes of therapeutics or else boggling at the mysteries of the pharmacopœia." [75]

The doctrine is well established that the courts will not in *mandamus* proceedings endeavor to ascertain for themselves the

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(where the board had no discretion to refuse a license to sell cigarettes manufactured only from pure tobacco).

[72] Bostock *v.* Sams, 95 Md. 400 (1902). Ordinance attempted to authorize refusal of permit to erect building which would not conform in appearance to other buildings in the neighborhood, and would tend to depreciate the value of surrounding property.

[73] Griffin *v.* United States *ex rel.* Le Cuyer, 30 D. C. App. 291 (1908); State *ex rel.* Johnston *v.* Lutz *et al.*, 136 Mo. 633 (1896).

[74] State *ex rel.* Galle *v.* New Orleans, 113 La. 371 (1904).

[75] State *ex rel.* Granville *v.* Gregory, 83 Mo. 123 (1884).

standing or reputation of the institution found deficient by the administration.[76]

The same rule prevails where the licensing authority has in the exercise of discretion duly vested passed adversely upon the personal qualifications or characteristics of an applicant. *Mandamus* was denied to overrule the decision of the State Board of Examiners of Architects in refusing a license to relator on the ground that he was a builder and not an architect, although the trial court had found that he was an architect and had ordered the writ to issue.[77] And where the writ was sought to secure a certificate to practice dentistry denied by the board after a personal examination of the relator, the petition was dismissed and the refusal of the court below to inspect the examination papers was sustained.[78]

Mandamus has been denied to overrule the exercise of discretion in denying a license to a person deemed unfit to be an auctioneer, the court declaring that the discretion of the mayor is not subject to judicial supervision or control.[79] It has been denied also to overrule the determination that relator was not qualified to run an intelligence office,[80] did not possess the moral attainments requisite to entitle him to a license for a dram-shop,[81] or was not a fit and suitable person to conduct a pawnbroker's establishment.[82] So also it was refused where the County Commissioners denied a license to carry fire-arms on the ground that the applicant and his witnesses were unknown to them, so that they were not satisfied as to his moral character.[83] The court observed further that if the statute requiring a license were unconstitutional, *mandamus* certainly could not be employed to compel its issue.

Where the privilege sought is of great importance, the courts are inclined to be more guarded in their language when declining to review administrative judgments on moral qualifications, although a careful search has failed to discover any instance where *manda-*

[76] Williams *v.* Dental Examiners, 93 Tenn. 619 (1894); State *ex rel.* Medical College *v.* Coleman, 64 Oh. St. 377 (1901); State *ex rel.* Kirchgessner *v.* Board of Health, 53 N. J. L. 594 (1891).

[77] Illinois State Board of Architects *v.* The People, 93 Ill. App. 436 (1900).

[78] Ewbank *v.* Turner, 134 N. C. 77 (1903).

[79] People *ex rel.* Schwab *v.* Grant, 126 N. Y. 473 (1891).

[80] People *ex rel.* Hall *v.* San Francisco, 20 Cal. 592 (1862).

[81] State *ex rel.* Kyger *v.* Holt County Court, 39 Mo. 521 (1867).

[82] Harrison *v.* People, 121 Ill. App. 189 (1905).

[83] Florida *ex rel.* Russe *v.* Parker, 57 Fla. 170 (1909).

mus was issued because the court differed from the administration on the question of an applicant's character. But in State *ex rel.* Hathaway *v.* State Board of Health,[84] which denied *mandamus* to compel a certificate to practice medicine, where the board's refusal was based on the ground that relator's previous advertising had been unprofessional and dishonorable, the court qualified its assertion that the Board of Health is charged with the performance of important discretionary duties, whose performance will not be hampered by *mandamus*, by the exception: "until a case of manifest injustice is shown." In a similar case where the unprofessional conduct consisted in the claim to be a medicine man of a tribe of Indians and the proprietor of a marvelous *nostrum* which when taken internally would cure *cholera morbus* and when applied externally drive away rheumatism, the court, though unqualified in its assertion that the certificate could not be compelled by *mandamus*, went further and observed that unprofessional conduct must consist in something more than the violation of some professional code of ethics.[85]

Many of the administrative decisions which the courts decline to review relate to matters which the Supreme Court declares may lawfully be committed to the uncontrolled discretion of the board.[86] Where the discretion is so wide that it may be exercised without announcing the reasons on which it is based, the administrative judgment seems necessarily free from judicial review. To require the administration to set forth in its answer every motive and circumstance which influenced its action would defeat the very

[84] 103 Mo. 22 (1890).

[85] State *ex rel.* Powell *v.* State Medical Examining Board, 32 Minn. 324 (1884).

[86] This is true of the denial of a license to sell liquor, Sherlock *v.* Stuart, 96 Mich. 193 (1893), where based on the ground of excessive numbers, State *ex rel.* Howe *v.* Northfield, 94 Minn. 81 (1904); denial of a license to keep a tavern on ground place proposed is not convenient, Yeager, *ex parte*, 11 Gratt. (Va.) 655 (1854); to run a theatre, People *ex rel.* Armstrong *v.* Murphy, 72 N. Y. Supp. 473 (1901); to conduct a musical entertainment, on the ground that it would have a demoralizing influence since liquors were dispensed in the place proposed, People *ex rel.* Dorr *v.* Thatcher, 42 Hun (N. Y.) 349 (1886); to erect a livery stable, Hester *v.* Thomson, 35 Wash. 119 (1904); to construct a sidewalk, State *ex rel.* Connor *v.* St. Louis, 158 Mo. 505 (1900); or to run a ferry, on the ground that the public necessity did not require it, State *ex rel.* Campbell *v.* Cramer, 96 Mo. 75 (1888). *Cf.* Commonwealth *v.* State Board of Health, 4 Walker (Pa.) 350 (1862). In Bailey *v.* Van Buren Circuit Judge, 128 Mich. 627 (1901), where the board declined to approve a druggist's bond on the ground that the sureties were insufficient, the court refused to frame for the jury an issue as to good faith.

purpose for which this wide discretion is vested. But Yick Wo *v.* Hopkins [87] is still law to the effect that the exercise of this discretion is improper when employed arbitrarily and unjustly to discriminate against a certain class. One who had been denied a license under such circumstances could clearly resist criminal prosecution.[88]

Possibly under such circumstances, *mandamus* would lie to secure a license. In the opinion from the Missouri court which contained the strongest language against reviewing the administrative discretion by *mandamus*,[89] it was said that the discretionary power to refuse a certificate to practice medicine does not extend to discriminating against any particular school of medicine. And in another case where a peremptory *mandamus* was denied to overrule the decision of the board of health in revoking permits to sell milk, that court suggested that relator should proceed by alternative *mandamus* if the board had acted arbitrarily or tyrannically.[90] In another decision from Missouri, it was declared *obiter* that, if the board withholds a license from caprice, *mandamus* will lie to compel them to perform their duty, even though the ordinance may not provide that no person possessing the necessary qualifications shall be refused a license.[91] The same possibility of judicial review is suggested by another *dictum* which states that to secure *mandamus*, it is not sufficient to allege in general terms that the refusal of the permit was capricious, tyrannical, arbitrary and unreasonable, but that facts tending to show it must be stated.[92]

All these decisions, however, dealt with administrative determinations reached after an endeavor to ascertain whether the applicant possessed certain qualifications or attainments announced as the condition on which all should be entitled to receive the license or permit. Where the board is not required to set forth the conditions which are to control its discretion, its action is necessarily in a certain sense capricious and arbitrary. Since no applicant has ground of complaint merely because he is denied permission under circumstances identical to those under which it is granted to another, it must be exceedingly doubtful whether he could coerce the issue of a license by showing further that licenses were invariably denied to

[87] 118 U. S. 356 (1886). [88] *Ibid.*

[89] State *ex rel.* Granville *v.* Gregory, 83 Mo. 123 (1884).

[90] People *ex rel.* Lodes *v.* Board of Health, 189 N. Y. 187 (1907).

[91] St. Louis *v.* Lamp Mfg. Co., 139 Mo. 560 (1897).

[92] People *ex rel.* Shelter *v.* Owen, 116 N. Y. Supp. 502 (1909).

some group or class to which he belongs under circumstances which uniformly resulted in permission being accorded to others. It is more likely that he must assume the risk of acting without permission, relying on the discrimination practiced as a defense when prosecuted criminally.

But the *dicta* quoted are an indication that where the discretion vested is not unlimited, *mandamus* will sometimes lie to control the action of the board. Where their discretion is confined to the ascertainment of matters of fact, *mandamus* may be employed to review the assumption of power to determine questions of law.[93] Thus the writ was granted where the return of building commissioners admitted conditions necessary to entitle relator to his certificate and revealed that their refusal was based on error of law.[94]

And where in any other way the pleadings disclose that the issue of the writ will not interfere with the exercise of discretion but will force action refused on some other pretense, the court will grant relief. Thus where on demurrer to the petition it was conceded by the board that the relator on examination had exceeded by five per cent the minimum requirements and that he was denied his certificate "wilfully and maliciously," redress was given on the theory that the board having exercised its discretion and found relator qualified, the issue of the certificate was a mere ministerial act.[95] The writ was also granted where the discretion vested was confined to the power to determine the reputability of the college from which relator received his diploma, and the board by demurrer confessed that it found the standing of the institution satisfactory, but denied the license through malice and the desire to injure relator's college in order to promote the interests of a rival in which the members of the board were personally interested.[96] Having determined that the college was reputable, their judicial or discretionary power was said to be exhausted. In discussing the function of the writ, the court declared that it could afford a remedy where the discretionary power was exercised with "manifest injustice" or where "it is clearly shown that the discretion is abused." It was said that an officer may be guilty of "so gross an abuse of discretion or such an

[93] Gage *v.* Censors, 63 N. H. 92 (1884).

[94] MacFarland *v.* Miller, 18 D. C. App. 554 (1901).

[95] Dean *v.* Campbell, 59 S. W. 294 (Tex. 1900).

[96] The Illinois State Board of Dental Examiners *v.* The People *ex rel.* John M. Cooper, 123 Ill. 227 (1887).

evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined." No such broad principle was necessary to establish the right to relief under the pleadings; but in a recent Missouri decision, the issue of the certificate was compelled merely because the court differed from the board on a finding of fact.[97] The denial of the certificate was based on the finding of the board that the applicant was not a matriculant in a medical school prior to a certain date. The court ruled that the evidence before the board could not possibly warrant such conclusion, and seemed to regard its power to overrule the finding of the board in the same light as its duty to set aside the verdict of a jury. But any such doctrine must be confined to determinations based merely on the weighing of evidence and involving no exercise of expert judgment or opinion.

Where the discretion has been rightly exercised, the court will not issue *mandamus* conditioned on compliance by the relator with such lawful changes as the board may order. "The office of a *mandamus* is not to compel action by the building department in advance of the preparation and adoption of proper plans, but only to compel action when plans affording no legitimate ground of objection have been arbitrarily or unreasonably condemned." [98]

The writ will not issue against an officer subject to the control of some higher administrative authority. Thus, where a building commissioner denied a permit to make alterations and his denial was sustained by a Board of Appeal, the court held that he had no authority under the statute to issue the permit and therefore could not be constrained by *mandamus*.[99] Whether some action might be entertained to review the decision of the Board of Appeal was not determined.

Certiorari proves an even less effective remedy than *mandamus;* for it is refused, not only because of the nature of the decision sought to be reviewed,[100] but because of the impotence of the

[97] State *ex rel.* McCleary *v.* Adcock, 206 Mo. 550 (1907).

[98] Hartmen *v.* Collins, 94 N. Y. Supp. 63 (1905).

[99] Greene *v.* Damrell, 175 Mass. 394 (1900).

[100] In Hildreth *v.* Crawford *et als.*, 65 Iowa 339 (1884), where a pharmacist's license was revoked because of illegal sales of intoxicants, the court declared that where the commissioners of pharmacy are clothed with power to determine certain facts, their decision cannot be reviewed on *certiorari* upon the ground that the evidence was incompetent or insufficient; and in State *ex rel.* Puyallup *v.* Superior Court, 50 Wash. 650 (1908), prohibition was issued to prevent *certiorari* to review the act of the council in revoking a liquor license, on the ground that its action in revoking a license with-

remedy. "If the act of granting a license is merely ministerial, the writ of *certiorari* will not lie to review an order of the board, because it is not judicial in its nature. And if the act is judicial, yet discretionary in character, the writ will not lie because it would be contrary to a discretionary power to have it reviewed by way of appeal, or by any proceeding in the nature of an appeal." [101] The writ has been denied to review the determination of a board of health that relator was not entitled to a license to sell milk, where under the statute such determination might be reached without granting a hearing, on the ground set forth in the opinion that *certiorari* lies only to review action judicial in character, and a judicial proceeding implies a hearing as a matter of right to the person affected thereby.[102]

In some jurisdictions, however, *certiorari* is employed to review administrative action not necessarily judicial in nature. There it seems to afford the same opportunities for redress which are available in *mandamus* proceedings. In Pennsylvania, though *certiorari* is denied to review the exercise of discretion in granting or refusing a license to sell liquor,[103] it is employed, where there has been a hearing, to ascertain whether the licensing authority has kept within the limits of the powers conferred and has exercised them in conformity with law. It was decreed that where there was no discretion to refuse a license, the denial of the board should be reversed and a *procedendo* awarded.[104] In New Jersey, relief against the revocation of a license was granted for the express reason that the board had failed to accord a hearing.[105] In an Iowa decision which denied *certiorari* on the ground that it is unavailable to review the correctness of decisions of fact within the jurisdiction vested, it was

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out cause and refunding the unearned portion of the license fee is conclusive and not subject to review by the courts.

[101] Com'rs of Raleigh *v.* Kane, 2 Jones L. R. (47 N. C.) 288 (1855).

[102] People *ex rel.* Lodes *v.* Department of Health of the City of New York, 100 N. Y. Supp. 788 (1906), affirmed on appeal without opinion in 102 N. Y. Supp. 1145 (1907).

But in the same jurisdiction it may possibly be inferred that *certiorari* is not necessarily improper to review the revocation of a license after a hearing, for the denial of the writ has been placed on the ground that it was not requested in season to award relief before the expiration of the license. People *ex rel.* Pechtold *v.* Bogart, 107 N. Y. Supp. 831 (1907).

[103] Reed's Appeal, 114 Pa. St. 452 (1886).

[104] Pollard's Petition, 127 Pa. St. 507 (1889).

[105] Balling *v.* Board of Excise of City of Elizabeth *et al.*, 74 Atl. 277 (N. J. 1909).

stated *obiter* that *certiorari* may consider whether the defendant has exceeded his proper jurisdiction or is otherwise acting illegally, and that relief would be given if the determination had been reached without a hearing.[106] But this employment of the writ to review action not judicial in nature runs counter to the great weight of authority.

Where there exists a recognized ground of equitable jurisdiction, it seems that the licensing authority may be enjoined from taking any action with respect to the granting or refusal of a license, if the statute under which it claims authority is unconstitutional.[107] But an injunction will not issue merely because the board seems about to make a mistake in deciding whether a license shall be granted. Where it was sought to prevent a sealer of weights and measures from deciding whether he would approve of a certain kind of computing-scale, on the ground that he intended to condemn all scales of the given variety, it was held that the correctness of this kind of scale was not properly in issue, because the court could not take from the officer the duty of deciding the question on the ground that he intends to come to a wrong decision.[108] In another case injunction was denied to restrain the revocation of a license, on the ground that the board had the right to proceed to revoke even if they were about to act erroneously, and that the statute giving an appeal to the district court on questions of law and fact furnished an adequate remedy.[109] Such remedy as is afforded by the possibility of securing the license by *mandamus* would seem sufficient ground for denying the interposition of equity in all cases where no positive interference is threatened.

Moreover, it has been held that injunction will not lie to restrain a board of health from interfering with a business for which a permit was denied, however wrongfully, where the statute provides pecuniary penalties for the violation of their orders, for this is in the nature of an appeal to equity to restrain public officers from enforcing the criminal law.[110] But a contrary result was reached where the court held that the rule that equity will not enjoin the enforcement of a penal ordinance is limited to attempts to restrain judicial

[106] Iowa Eclectic Medical College Ass'n *v.* Schrader, 67 Ia. 659 (1893).
[107] Moneyweight Scale Co. *v.* McBride, 199 Mass. 503 (1908), (*semble*).
[108] *Ibid.*
[109] Wolf *v.* State Board of Medical Examiners, 123 N. W. 1074 (Minn. 1909).
[110] Cohen *v.* Department of Health, 113 N. Y. Supp. 88 (1908).

enforcement, and restrained a board from closing the plaintiff's place of business for the alleged violation of a liquor ordinance.[111] Where the enforcement threatened is not penal in its nature, a bill will be granted to restrain unlawful action, provided there is some basis of equitable jurisdiction. The immediate incarceration in a pest house of one afflicted with leprosy has been restrained where it appeared that less stringent measures would afford adequate protection to the public.[112] The court doubted whether an action for damages would be an adequate remedy, even if one would lie, but were of opinion that the officers would not be personally responsible for such an error in honest judgment of what their official duty required. In a case where a bill to enjoin the enforcement of an ordinance requiring the registration of plumbers was dismissed because the ordinance was held to be valid, the court observed that even if it were void, no individual plumber could secure an injunction because no property right was involved, but that the firm employing plumbers might secure such relief because there was a threatened invasion to property rights in that their business would be greatly injured if they were prevented from securing the services of plumbers.[113] It is not inconceivable that the individual plumber might also feel that his business would be greatly injured if he were prevented from securing employment.

It is manifest, then, that where the lawfulness of any action may be conditioned on the possession of a license, the individual is largely dependent upon the judgment of the administrative body to whom the duty of passing upon his qualifications is entrusted. Without a license he proceeds at his peril. Where there is power to regulate and the standards imposed relate to the matter under supervision, but are invalid merely because of their excess, the one denied permission cannot proceed without a permit, but is limited to the right to enforce the issue of a license or permit on compliance with standards deemed adequate by the court. A builder cannot erect a wall according to his fancy, although the requirements of the administration may be excessive.[114] It has been held that a showing of

[111] Cañon City *et al. v.* Manning *et al.*, 95 Pac. 537 (Col. 1908).

[112] Kirk *v.* Wyman, 83 S. C. 372 (1909). In Chicago *v.* The Ferris Wheel Co., 60 Ill. App. 384 (1895), the city was enjoined from interfering with the Ferris Wheel for nonpayment of a license fee which the court adjudged exorbitant.

[113] Robinson *v.* City of Galveston, 111 S. W. 1076 (Tex. 1908).

[114] City of New York *v.* O. J. Gude Co., 107 N. Y. Supp. 484 (1907), (*semble*).

qualifications, a tendered compliance with all the terms and conditions of the license ordinance, and an arbitrary and wrongful refusal by the municipal authorities to issue the license does not waive the necessity of such license or justify acts done without it.[115] But the minority opinion insisted that such a doctrine applies only when the board has discretion to refuse the license. In an earlier decision in the same jurisdiction, where the license was withheld by a ministerial officer after the licensing authority had ordered its issue, it was held that no conviction could be sustained for acting without the license. The wrong was said to be that of the officer, not of the applicant.[116]

And it is clear that a prosecution for unlicensed acts may be defeated by showing that the statute under which the license is required is not a valid police measure, because a mere pretense for exacting revenue, because the matter to which it relates is not subject to police supervision,[117] because the qualifications or conditions required are not germane to the matter under regulation,[118] because the statute discriminates unwarrantably against certain members of the class required to be licensed,[119] or permits such discrimination to be made by the licensing authority,[120] or because the uncontrolled discretion lawfully vested is employed unreasonably to discriminate against the class to which the defendant belongs.[121]

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[*To be continued.*]

[115] City of Montpelier *v.* Mills, 85 N. E. 6 (Ind. 1908), and cases cited in the opinion. *Cf.* Phœnix Carpet Co. *v.* The State, 22 So. 627 (Ala. 1897), which held that wrongful refusal to receive payment of a tax and to issue a license does not justify corporation in doing business without the license. Its remedy is by *mandamus* to compel the issue of the license.

[116] Padgett *v.* The State, 93 Ind. 396 (1884).

[117] Bessette *v.* The People, 193 Ill. 334 (1901).

[118] Cummings *v.* Missouri, 4 Wall. (U. S.) 277 (1866).

[119] State *v.* Gardner, 58 Oh. St. 599 (1888); Harmon *v.* The State, 66 Oh. St. 249 (1902); State *v.* Gantz, 124 La. 535 (1909); Commonwealth *v.* Shafer, 32 Pa. Super. Ct. 497 (1907).

[120] Yick Wo *v.* Hopkins, 118 U. S. 356 (1886).

[121] *Ibid.*, as qualified in Crowley *v.* Christensen, 137 U. S. 86 (1890).